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June 29, 2009

Surface Transportation Board
Attn: STB Ex Parte No. 690
395 E Street SW
Washington, DC 20423-0001

RE: Twenty-five Years of Rail Banking

To Whom It May Concern:

On behalf of Rails-to-Trails Conservancy (RTC), I wish to speak at the hearing of the Surface Transportation Board on July 8, 2009 concerning the future of rail banking under Section 8(d) of the National Trails System Act. I would request fifteen minutes to address the Board regarding the questions identified in the hearing notice. Please find attached my written testimony. I will also be making use of a PowerPoint presentation. I look forward to the opportunity to share RTC's more than twenty years of experience facilitating the construction of rail-trails nationwide.

Sincerely,

Marianne Fowler
Senior Vice President of Federal Relations

Enclosure



**Testimony of
Marianne Wesley Fowler, Senior Vice President
of Federal Relations
Rails-to-Trails Conservancy
Presented to the Surface Transportation Board**

“TWENTY-FIVE YEARS OF RAIL BANKING: A REVIEW AND LOOK AHEAD”

June 29, 2009

Introduction

Rails-to-Trails Conservancy is pleased to offer this testimony on the occasion of the 25th anniversary of Section 8(d) of the National Trails Systems Act (the “Trails Act”), which created the federal railbanking program. Rails-to-Trails Conservancy (RTC) is a national nonprofit conservation organization founded in 1985. Headquartered in Washington, D.C., with four regional field offices located in California, Florida, Pennsylvania, and Ohio, RTC’s mission is to create a nationwide network of trails from former rail lines and connecting corridors to build healthier places for healthier people. RTC has more than 100,000 members and supporters nationwide.

Over the last 25 years, RTC has taken a leading role as defender, user, and advocate for the Trails Act. Through its Trails and Greenways Clearinghouse, RTC provides technical assistance to government agencies, communities, and grassroots organizations across the country to facilitate the preservation and continued public use of rail corridors that are not currently needed for rail transportation through conversion into public trails and non-motorized transportation corridors. RTC has also produced numerous publications and undertaken studies on a broad range of topics, including the benefits and economic impacts of rail-trails, trail design, and liability issues. RTC’s “rails-with-trails” study is the most comprehensive source of information about “rails-with-trails” – the emerging trend of developing multi-use trails on appropriate space adjacent to or within the right of way of active rail lines. Through its Legal Program, RTC has defended the Trails Act in the Courts and before Congress, and has advocated for vigorous implementation of the law before this Surface Transportation Board (“Board” or “STB”). RTC also vigorously pursues and advocates for policies and funding opportunities that benefit, facilitate and protect America’s trails.

Over the course of many years, RTC has developed and manages a comprehensive database of information about rail-trails, including the number, mileage, and location of rail-trails, and the extent to which they are developed and open. Part of that information is available to the public through www.TrailLink.com, a free access Web site with detailed maps with trail

overlays designed to help trail users find rail-trails based upon locale, allowed uses, surface types, historic features, nearby amenities, etc. This database also includes more esoteric information such as the number of "railbanking orders" that have been issued by this Board under the Trails Act, and the subsequent actions taken as a result of the issuance of these railbanking orders. The database houses thousands of records relating to railroad corridors, open trails, and trails in development, with data on rail-trails dating back to 1969, and information on railbanked corridors from 1986 forward. Trail-related information is gathered by online monitoring of trail progress in the news and other internet sources and through our large network of trail managers, advocates, and users. Maintaining communication with hundreds of local and state trail professionals and enthusiasts has allowed RTC to collect, continuously update and validate rail-trail information. To the best of our knowledge, this is the most comprehensive – and perhaps the only – national database of information about rail-trails in existence.

RTC also relies on public information made available through the STB to track railroad abandonments and activate its "Early Warning System." By monitoring abandonment proceedings initiated before the Board, RTC is able to provide timely notice to community activists and public officials of impending abandonments and help them take advantage of railbanking opportunities. Each week, RTC staff reviews filings submitted to the STB, maintaining records of corridors proposed for abandonment, noting the status of Interim Trail Use agreements, and tracking filings, decisions and notices related to corridors under railbanking negotiations. In some cases, we rely on trail managers to verify final railbanking agreements, if the railroad and trail group have failed to notify the STB that an agreement was reached.

This background on the activities and programs of Rails-to-Trails Conservancy is provided by way of establishing RTC's credibility in speaking knowledgeably and authoritatively on the questions posed by the Board in its call for this hearing.

Success of the Trails Act/Corridor Conversion Rates

The Trails Act was passed by Congress in 1983 out of concern that our Nation's build rail corridor infrastructure, which was painstakingly built up more than a century ago through the use of eminent domain, or public lands grants, loan guarantees and cash awards, was being rapidly lost through railroad abandonments. As Congress rightly recognized, it would be virtually impossible for even a governmental entity to recreate this system once the right of way was abandoned and sold, and the bridges, tunnels and other costly structures destroyed, much less a private railroad unless granted future powers of eminent domain and unlimited resources.

The law establishes a clear "national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use." 16 U.S.C. § 1247(d). And in furtherance of this policy, this Board, as well as the Departments of Transportation and the Interior, is first and foremost directed to "encourage State and local agencies and private interests to establish appropriate trails" in administering its regulatory responsibilities.

The STB has focused its implementation of the Trails Act on the second provision of the statute, stating that the Board “shall impose such terms and conditions as a requirement of any transfer or conveyance [of such rights-of-ways] for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.” *Id.* The Board’s issuance of railbanking orders, in response to trail use requests from a state, political subdivision, or qualified private organization to which the railroad assents, has enabled such trail treasures as Missouri’s 225-mile Katy Trail National Park, which had over 300,000 annual user visits in 2001, and Nebraska’s 320-mile Cowboy Trail, the longest rail-trail in the country. Without railbanking, these extraordinary public resources would have been irreparably lost.

The numbers in RTC’s database tell a story of success and unrealized potential. On the success side, since the program’s inception and up to the present date, 698 railbanking orders (either Certificates of Interim Trail Use or Abandonment (CITUs) or Notice of Interim Trail Use or Abandonments (NITUs)) have been issued by the STB. Of these corridors subject to railbanking requests, 301 have been successfully railbanked under Section 8(d), representing 5,079 miles, and 92 are currently in negotiation, while 159 corridors were abandoned when railbanking negotiations were unsuccessful. Of the railbanked corridors, 120, representing 2,764 miles, are presently open to the public for use as trails and 72 corridors representing 1,122 miles are currently under development.

As a result of railbanking, these corridors are preserved for future use, while providing multiple benefits to the communities in which they are located. For example, according to a study conducted by RTC on the Pine Creek Rail Trail, a 62.6-mile railbanked line in rural North Central, Pennsylvania, the trail was visited by 138,000 users in 2006, who expended more than \$5 million in food and lodging while using the trail.¹ Boston’s Minuteman Trail, serving an urban area, has more than 1 million users each year. Some use is purely recreational, much is for purposeful travel, and all, we assume, is pleasurable. The Trails Act also paved the way for state legislatures to formally adopt state level policies favoring rail corridor preservation and establishing state-level rails-to-trails programs, including rights of first refusal, that have worked in tandem with the Trails Act, or in its breach when the Trails Act was not invoked. And of course, the nine corridors that have been re-activated for rail service demonstrate that the program is serving its intended purpose of preserving these corridors for future rail service.

The 159 corridors whose railbanking negotiations fell short and were subsequently abandoned totaled 2,974 miles. To put these numbers in a larger perspective, over 832 corridors have been approved for abandonment in the past 25 years, representing 9,105 miles of our national rail system that have been lost, in all likelihood irrevocably. Of these corridors, only 163 were eventually converted into non-railbanked trails, which means that these trails are not subject

¹ Rails-to-Trails Conservancy, *Pine Creek Rail Trail 2006 User Survey and Economic Impact Analysis* (December 2006).

to rail service re-activation. In short, 5,079 miles saved as a part of our federally railbanked corridor system; 9,105 miles lost. If we were playing baseball, a .358 average would be exceptional. When playing with our nation's future, the loss of two thirds of what could have been saved does not constitute success.

What can and should the Board do to facilitate railbanking?

The numbers show that, while the Trails Act has been effective when used, railbanking is the exception rather than the rule. Which brings us to the question posed in the hearing notice: "What can or should the Board do to further facilitate railbanking and encourage the restoration of active rail service on railbanked lines?" To answer this question, we need to go back to 1986, when the Interstate Commerce Commission (ICC), this Board's predecessor, chose not to adopt an interpretation of the Trails Act that would have required corridors to be transferred to a willing trail manager. This tact left preservation of our Nation's built rail infrastructure solely to the discretion of private railroads. This Board's strictly "hands-off" approach toward interim trail use requests and negotiations stands in stark contrast to the agency's active role in Offers of Financial Assistance (OFA), the longstanding provision under which the ICC (now STB) has the authority to compel the transfer of railroad property that is the subject of an abandonment application to another rail operator filing an OFA, and establish mandatory terms and conditions for such transfers.

In the absence of any regulatory mandate to participate in railbanking, many railroads declined to railbank corridors based on misplaced concerns about potential residual liabilities, the lure of windfall profits through private sales, or for no apparent reason at all. Some bold railroads even used the threat of railbanking to make piecemeal corridor "sales" to adjacent landowners, even in cases where the adjacent landowner already owned the underlying fee interest in the corridor. Without any regulation or oversight by the STB, some railroads have also insisted on grossly inflated purchase prices, based on appraisal methodologies that presume an "across the fence value" rather than the accepted methodology used by this Board for valuing corridor transfers in the context of OFAs. These practices clearly contributed to the large numbers of rail abandonments that occurred over the last 25 years without any participation in the railbanking program.

And certainly, there are a number of corridors that were abandoned after no trail use request was received. Based on RTC's experience working with communities as part of the Early Warning System, we believe that this is due in part to the expedited time frames in exempt abandonment proceedings, which are insufficient to allow public agencies to secure the approvals needed to submit a trail use request. Given these time frames, railbanking opportunities will continue to be lost.

Many efforts to preserve rail corridors through railbanking will continue to be thwarted unless this Board changes its current approach to the Trails Act. In general, the STB's approach to rail-trails is passive: the agency issues and extends Interim Trail Uses (ITUs), but appears

reluctant to adopt policies that further the statutory goals. And in some cases, the STB has adopted a dual standard for railroads and for Trails Act requests. This Board's decision in RLTD Railroad Corporation – Abandonment Exemption – In Leelanau County, MI, Docket No. AB-457X (served Oct. 30, 1997), is a case in point. When presented with a trail use request, to which the railroad consented, the Board refused to issue a trail use condition based on its view that the corridor in question had become severed from the National Rail System due to *de facto* abandonment – despite the fact that this Board routinely exercises jurisdiction over numerous active rail corridors that are arguably not connected to the national rail system.

City of Lincoln v. STB, 414 F.3d 858 (9th Cir. 2005), is another example of this Board's failure to heed the congressional directive in the Trails Act to "encourage State and local agencies and private interests to establish appropriate trails" in administering its regulatory responsibilities. In that case, the City of Lincoln sought to condemn a 20-foot strip of excess right-of-way on an active rail line for trail use, based on established precedent permitting railroads to convey excess right of way for non-railroad use. The STB found that the City's ability to condemn this property was preempted, despite the fact that trail use would not interfere in any way with railway operations.

There are certainly modest steps that the STB can and should take to encourage and facilitate rail corridor preservation through railbanking and interim trail use. First, the time period between notice of abandonment and effective date of abandonment is frequently too short to allow public agencies to secure the necessary approvals to initiate railbanking negotiations. Since exempt abandonment procedures apply to lines that have already been out of service for two years, there is no need for such an expedited time frame, particularly since this time frame may well preclude railbanking and interim trail use. These time frames should therefore be lengthened.

Second, the STB should re-examine the required language for filing statements of willingness, and the breadth of the interim trail manager's required assumption of liability. This language has, for example, prevented the State of Florida from participating in railbanking due to statutory limitations on the state's ability to assume liability.

Third, it is our experience that 180 days is almost never a sufficient amount of time to negotiate a railbanking/interim trail use, and requiring multiple extensions is a hardship on potential interim trail managers, particularly to private organizations that must pay a \$350 user fee for every extension request. Instead, one year is a more appropriate time frame for interim trail use negotiations.

Fourth, and perhaps not so modest a proposal, to best protect our rail corridor infrastructure from future deterioration, this Board should make 16 U.S.C. 1247 (d) mandatory, rather than discretionary.

Should Notice or a copy of Trails Act Agreements be submitted to the Board?

Scrutiny of the railbanking statistics provided by Rails-to-Trails Conservancy reveals that the status of 109 railbanked corridors representing 1,1193 miles is unknown. RTC has worked within the context of Board disinterest to tract the numbers of NITUs, CITUs, individual agreements, miles, number of corridors railbanked, etc. A requirement that Trails Act Agreements be filed with the Board would help in the gathering of accurate information and allow for greater understanding of the program. A document of record could also be helpful in addressing issues that might arise upon corridor reactivation.

Who should bear the cost to restore a rail corridor for rail service, including replacing any bridges that may have been removed during interim trail use?

It is important to put the question of who should bear the costs to restore a rail corridor for rail service into the proper context. Our response is guided by this Board's decision in Georgia Great Southern Division – Abandonment and Discontinuance Exemption– between Albany and Dawson, AB 389 (Sub-no. 1X), served May 16, 2003, reconsideration denied, *id.* served Feb. 2, 2004, in which the successor to the abandoning railroad asked this Board to vacate the trail use condition in order to reactivate rail service on the line, but then insisted that the trail manager had an obligation to re-convey the corridor to the railroad without any compensation. The interim trail manager opposed the request, pointing out that it had made a substantial payment to the original railroad in a bargain sale, for which the railroad took a substantial tax deduction. This Board simply vacated the trail use condition, ruling that this was a private contractual dispute between the railroad and the interim trail manager, in which the STB had no role.

While we disagree with this ruling, it does provide the current framework for the question of who should pay for the cost of restoring railroad structures: following the reasoning of Georgia Great Southern Division, there is no role for this Board in assigning responsibilities for the costs of restoring trail structures. Instead, as was the case with the question of payment to the interim trail manager, this is a private contractual matter, the enforcement of which must rest in the state courts. If the abandoning railroad, in conveying a corridor to the interim trail manager, wishes to ensure that bridges, tunnels and other structures remain in place for possible future rail service, the railroad should include specific provisions relating to these structures in the instruments of conveyance.

We cannot conceive of any circumstances under which it would be appropriate to compel a trail manager to pay for the restoration of railroad structures that were unconditionally transferred as part of a railbanking agreement. Requiring such a payment would result in a windfall to the railroad, a private, for-profit enterprise, at the expense of cash-strapped public park agencies and nonprofit organizations. Without the transfer of the corridor to an interim trail manager, it is likely that the railroad would have been required to remove these structures itself upon abandonment, at a significant cost. For example, as was the case of railbanked "Highline"

in mid-town Manhattan, New York, Conrail alleged, in adverse abandonment proceedings before the ICC, that "The cost of removing the Highline and its viaduct is estimated by Conrail to be \$34 million, covering the dismantling of the structures, the transportation of debris by truck from the site to the landfills, and the payment of dumping fees."

Moreover, the material used to construct railroad structures may have a substantial market or salvage value, and the price paid by the trail manager to the railroad for the corridor is likely to include the value of these structures (or if it did not, the railroad may well have taken a tax deduction for this value, as the railroad did in the case of the Highline Trail). It would be grossly unfair to require the interim trail manager to pay for the railroad's costs of restoring railroad structures, when the trail manager's assumption of responsibility for the structure likely resulted in a significant cost saving or tax benefit to the railroad.

Such an unfair result is compounded by the fact there are many situations in which railroad structure are removed either by order of the state public utility commission or under threat of such an order, to address a safety problem with the railroad structure. Often, grade separated rail-highway crossings are removed by the state departments of transportation because highway needs require a greater vertical or horizontal clearance than the structure allows or for safety reasons. Removal of structures can be the result of damage caused by flooding or other natural occurrences. And in Pennsylvania, for many years, the public utility commission simply ordered that all inactive railroad crossings be "abolished" and structures removed, even where the corridor had been transferred to a trail manager and was being used as a trail. Under these circumstances, it would be particularly unfair to require the trail managers to pay the costs of replacing these structures.

Additionally, the railbanking provisions of the Trails Act were adopted by Congress as a long-term strategy for corridor preservation. Structures deteriorate; technologies and design change. Pursuit of a policy holding trail managers responsible for maintaining railroad features to a standard necessary to accommodate rail use at the time of reactivation leads to absurdity. Imagine fifty years hence when a train whose second deck magnetically levitates above a rail-based carriage. The height of this wondrous train disallows its passage through the 19th century tunnel on a railbanked corridor. Would anyone seriously suggest it is the trail manager's responsibility to anticipate and pay for future railroad needs?

How have reversionary property owners been affected by rail banking?

There has been much sound and fury over the purported impact of railbanking orders on the putative "property rights" of adjacent landowners, or so-called "reversionary property owners." These adjacent landowners point to a questionable, and, most importantly, non-precedential decision rendered by the U.S. Court of Appeals for the Federal Circuit, *Preseault v. United States*, 100 F.3d 1525 (Fed. Cir. 1996), which found that, in some cases, interim trail use imposes an additional easement on the rail corridor for which the underlying landowner is entitled to compensation. However, it is important to note that the courts have never found that

the use of these corridors for *railbanking* in any way impacts these so-called “reversionary property” interests. In other words, if a state or political subdivision acquired a corridor and simply banked it, unused and undeveloped for the foreseeable future, while in the meantime wholly excluding adjacent property owners from the land, these property owners would have no cause to complain about a “taking” of their property, since railbanking is unquestionably a permissible use of a railroad easement.

What this demonstrates is that interim trail use does not stand as an obstacle to the underlying landowner’s ability to regain possession of the corridor. To the contrary, the law has provided an economic windfall to adjacent property owners – and an even greater one to their class action legal counsel – who have richly profited from the compensation litigation.² As a result of interim trail use, the underlying property owners receive a payment from the United States to compensate for the additional trail use easement on the corridor, while at the same time, they now have access to the corridor from which they otherwise would have been excluded, *and* they retain their underlying fee interest in the corridor and right to repossess the property if interim trail use ceases without any re-activation of rail service.

The benefits to adjacent landowners do not end there. Study after study has demonstrated that trails increase the value of adjacent property more than similar property not adjacent to a trail, and protect their homes from flood damage by absorbing excess water.³ Adjacent property owners, including some of the most vocal opponents of the trail, are its most avid users, with the attendant health and wellness benefits of regular exercise.⁴ And like all members of the public, adjacent landowners benefit from the protection of green and open space, improved air and water quality, preservation of history and culture, and livable communities provided by trails.⁵ So, the evidence (as distinct from the groaning and moaning), is that adjacent landowners have benefited economically and personally from railbanking.

² In most compensation cases, the compensation payment to the landowner is dwarfed by the attorneys fees paid by the United States to legal counsel *see, e.g. Carl Junction R-1 School District v. U.S.A*, Case No. 05-3L (Fed. Cl., filed Jan. 3, 2005) (payment to the named plaintiff was \$46,093; payment awarded to attorneys was \$476,727.70)

³ See Rails-to-Trails Conservancy, “Economic Benefits of Trails and Greenways,” Oct. 2003, http://www.railstotrails.org/resources/documents/resource_docs/tgc_economic.pdf.

⁴ See Rails-to-Trails Conservancy, “Health and Wellness Benefits,” Dec. 2004, http://www.railstotrails.org/resources/documents/resource_docs/HealthandWellness.pdf; Rails-to-Trails Conservancy, “Historic Preservation and Community Identity,” Oct. 2003, http://www.railstotrails.org/resources/documents/resource_docs/tgc_Historic.pdf.

⁵ See Rails-to-Trails Conservancy, “Historic Preservation and Community Identity,” Oct. 2003, http://www.railstotrails.org/resources/documents/resource_docs/tgc_Historic.pdf; Rails-to-Trails Conservancy, “Trails and Greenways for Livable Communities,” April 2006, http://www.railstotrails.org/resources/documents/resource_docs/tgc_for_livable.pdf.

Conclusion

Our built railroad system represents an extraordinary investment in an energy-efficient form of transportation. In 1983, as it deregulated the rail industry and rightfully anticipated a rash of abandonments, Congress with great foresight sought to preserve the system knowing that the value of a clear corridor in a rapidly developing nation was inestimable. It gave us the Trails Act as the tool with which to accomplish its goal. The Surface Transportation Board and Rails-to-Trails Conservancy have been partners in this endeavor. Between us we've done well, but on balance, not good enough. We look forward to a future which not only features levitating trains, but also yields a stronger partnership as together we become better stewards of our rail corridor estate.